



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, 215, 234, 239, and 252

[Docket DARS-2016-0028]

RIN 0750-AJ01

Defense Federal Acquisition Regulation Supplement: Procurement of Commercial Items (DFARS Case 2016-D006)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2013, 2016, and 2018 relating to commercial item acquisitions.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571-372-6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 53101 on August 11, 2016, to amend the DFARS to implement the

requirements of sections 851 through 853 and 855 through 857 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92, enacted November 25, 2015), as well as the requirements of section 831 of the NDAA for FY 2013 (Pub. L. 112-239, enacted January 2, 2013). This rule provides guidance to contracting officers for making price reasonableness determinations, promotes consistency in making commercial item determinations, and expands opportunities for nontraditional defense contractors to do business with DoD.

On August 3, 2015, DoD published proposed DFARS rule 2013-D034 to implement the requirements of section 831 of the NDAA for FY 2013 (80 FR 45918). Based on the comments received in response to that proposed rule, and in order to implement the requirements in sections 851 through 853 and 855 through 857 of the NDAA for FY 2016, DFARS rule 2013-D034 was closed into this DFARS rule.

In addition, this final rule implements section 848 of the NDAA of FY 2018 (Pub. L. 115-91, enacted December 12, 2017), which amended 10 U.S.C. 2380 regarding the content of the written determination required when determining that the prior use of commercial procedures was inappropriate or is no longer appropriate.

II. Discussion and Analysis

Twelve respondents submitted public comments in response to the proposed rule. DoD reviewed the public comments in the development of this final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes.

1. For consistency in terminology, the word "data" has been changed to "information" where appropriate throughout the rule.
2. The language at DFARS 212.102(a)(ii) has been revised to state that a contracting officer may presume that a prior commercial item determination, or a determination that overturned a prior commercial item determination, made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item.
3. The language at DFARS 212.102(a)(iii) on nontraditional defense contractors was reworded for clarity.
4. The language at DFARS 212.209(b) and 215.404-1(b)(ii) was amended to add the word "and" to allow contracting officers to consider recent purchase prices paid by both the Government "and" commercial customers for the same or similar commercial items.
5. DFARS 215.404-1(b)(iv) and 234.7002(d)(3), have been revised such that if the contracting officer determines that the pricing

information submitted is not sufficient to determine the reasonableness of price, the contracting officer shall request other relevant information to include cost data. The proposed rule directed that the contracting officer may request other relevant information to include cost data.

6. To expedite commercial item determinations, the provision at DFARS 252.215-7010, paragraph (b)(1)(ii)(A) has been revised to require offerors to provide contract numbers and if available, a Government point of contact for items that have been previously determined to be commercial.

7. The provision at DFARS 252.215-7010, paragraph (b)(1)(ii)(B) has been reworded to remove the unintended offeror certification language from the proposed rule.

8. The provision at DFARS 252.215-7010, paragraph (d) has been reworded to require "the minimum information necessary" instead of "all data" to permit a determination that the proposed price is fair and reasonable.

9. The proposed rule language at DFARS 252.215-7010, paragraph (d)(3) has been removed as unnecessary, and paragraphs (d)(4) and (d)(5) have been renumbered accordingly.

10. The language at DFARS 252.215-7010, paragraph (d)(3), formerly paragraph (d)(4), has been reworded for clarity.

11. The DFARS provision 252.215-7013, Supplies and Services Provided by Nontraditional Defense Contractors, has been added

to advise offerors that in accordance with 10 U.S.C. 2380a, supplies and services provided by a nontraditional defense contractor, as defined in DFARS 212.001, may be treated as commercial items.

B. Analysis of Public Comments.

1. Agree with the rule.

Comment: Two respondents expressed support for the rule, stating that the rule will reduce the risk of fraud, increase accountability, and make the buying process more seamless for the military.

Response: DoD appreciates the support for this rule.

2. Audit clause.

Comment: One respondent recommended that DFARS 252.215-7010(b)(2) mirror the entire language of Federal Acquisition Regulation (FAR) 52.215-20(a)(2) because the respondent did not believe that Congress intended for either section 831 of the NDAA for FY 2013 or sections 851 and 853 of the NDAA for FY 2016 to expand the Government's access to cost or profit information when commercial items are priced based on catalog or market prices, or set by law or regulation.

Response: Section 831 of the NDAA for FY 2013 requires the establishment of standards for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the

reasonableness of price. To that extent, the rule sets forth a hierarchy of information that the contracting officer shall require to determine the reasonableness of the price, including other relevant information that can serve as the basis for a price assessment. Further, section 853 requires that contracting officers shall consider evidence provided by offerors of recent purchase prices paid by the Government for the same or similar commercial items in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased or applicable terms and conditions.

3. Catalog pricing provision.

Comment: Two respondents recommended removing or revising the catalog pricing provision. The respondents recommended deleting DFARS 252.215-7010(b)(1)(ii)(B)(2) because it is not based on any provision in the NDAA for FY 2013 or the NDAA for FY 2016, and is unclear about what it means for "catalog pricing" to be "consistent" or "not consistent" with "all relevant sales data." According to the respondent, the provision raises these unanswered questions:

(a) Does "catalog pricing" refer to prices shown in the catalog in question or in the offeror's proposed pricing for the proposal?

(b) Does "catalog pricing" refer to prices shown in the catalog that must be used in the pricing of all sales in order for that pricing to be "consistent" with "all relevant sales data?"

(c) Does the determination of consistency take into account whether "catalog pricing" is higher or lower than the pricing reflected in "all relevant sales data"?

(d) How does the use of the term "all relevant sales data" in the provision relate to the definition of the term "relevant sales data" in the proposed DFARS provision 252.215-7010(a)?

The respondent is concerned that contracting officers will not know what offerors mean by these statements, which could lead to confusion and misunderstandings.

Another respondent recommends removing the requirement in DFARS 252.215-7010 that an offeror provide an explanation as to whether their proposed prices that are based on catalog pricing are consistent with relevant sales data. The offeror believes this requirement constitutes a new and unauthorized certification.

Response: The language at DFARS 252.215-7010(b)(1)(ii)(B)(2) has been revised to remove the certification requirements.

However, for a commercial item exception, the offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for the acquisition, including prices at which the same item or similar items have been sold in the commercial market. Without the DFARS 252.215-7010(b)(1)(ii)(B)(2) requirements, the contracting officer will not have sufficient information to determine whether the price is fair and reasonable, and will need to request additional data. The catalog must state prices at which sales are currently, or were last made to a significant number of buyers constituting the general public. If the catalog pricing provided is not consistent with all relevant sales data, the offeror must describe the differences. It does not matter whether the catalog price is higher or lower than the proposed price. "Relevant sales data" means evidence provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets or other adjustments).

4. Collaboration on commercial item and price reasonableness determinations.

Comment: One respondent recommended that the rule codify and provide the opportunity for offerors to collaborate with DoD's

cadre of experts prior to a final decision by the contracting officer on commercial item and price reasonableness determinations.

Response: DoD concurs with the statement that an open exchange of information by both parties leads to more timely commercial item determinations and price analysis. DoD has already issued guidance to contracting officers to collaborate with the Defense Contract Management Agency (DCMA) cadre of experts to assist in the timeliness and consistency of commercial procurements. The cadre regularly engages with offerors to obtain an understanding of proposed commercial items and associated pricing. DCMA is also facilitating collaboration with offerors through commercial item memorandums of agreement with interested companies.

5. Commercial item determination.

Comment: One respondent questioned if there is no commercial market place to establish price reasonableness and the contractor only offers an item that is "of a type" customarily used by the general public for sale, is that sufficient for the contractor to escape the Truthful Cost or Pricing Data requirement? The respondent further questioned what constitutes an offer, and whether an advertisement on a website is sufficient? The respondent suggested that the rule define an

"offer" to incorporate a bona fide offer in a known market where competitive forces exist.

Response: DoD considers commercial item determinations separately from price reasonableness determinations. Commercial item determinations are not dependent upon the offered price of an item. The FAR 2.101 definition of "commercial item" does not require that the identical proposed item must be sold or offered for sale to the general public. When deciding whether to grant a commercial item exception to the requirement for certified cost or pricing data, FAR 2.101 permits contracting officers to consider items that are "of a type" - i.e., items that are similar to those customarily used by and sold or offered for sale to the general public. While pricing based on market prices is the preferred method to establish a fair and reasonable price, a commercial marketplace is not required for the item to meet the definition of a commercial item. This embraces DoD's broader view of the types of items that may qualify as commercial items and gives consideration to products and services offered by both traditional and nontraditional defense contractors. Contracting officers must use business judgement and consider all relevant factors when evaluating evidence of offers for sale, which may include advertisements on websites, sales orders, quotes, or other information that

demonstrate that the similar item has been offered for sale in the commercial marketplace.

Comment: One respondent stated that the final rule should permit commercial item determinations in a timely and efficient manner with minimal deliberations. The respondent further suggested that any further guidance that might be issued in support of commercial item determinations after the final rule is published would greatly improve its chances of succeeding and facilitate the desired results of the final rule.

Response: Timely and consistent commercial item determinations are the standard for DoD. The proposed rule promotes timeliness and efficiency by providing that contracting officers may presume that a prior commercial item determination made by a military department, defense agency, or another component of DoD shall serve as a determination for subsequent procurements. As such, DoD has instructed contracting officers to adopt the practice of recognizing prior known determinations as valid. To further assist in the timeliness and consistency of commercial procurements, DoD has established a cadre of experts within DCMA to provide advice to contracting officers. DCMA is also streamlining the exchange of information for the evaluation and pricing of commercial items through "memorandums of agreement" with interested companies. DoD will finalize the

Commercial Item Handbook to provide further guidance to contracting officers.

6. Conflating pricing with commercial item exception.

Comment: Two respondents recommended that commercial item determinations for exceptions from certified cost or pricing data be separated from price reasonableness determinations. One respondent recommended that DFARS 252.215-70XX(b)(1)(ii) be amended by striking the phrase "For a commercial item exception" and replacing it with the phrase "For items determined to be commercial" to ensure that the commercial item determination and the price reasonableness determination are kept separate.

Another respondent recommended changing DFARS 252.215-7010(b)(1)(ii) by separating the initial commercial item determination procedure from concurrent submission of any cost or pricing data that may be needed for a subsequent and independent evaluation of price reasonableness. This new clause creates several negative impacts when requiring subcontractors and/or prime contractors initial upfront submission of all past sales because:

(a) It excludes any use of FAR 2.101 commercial item definition of "offered for sale" because there is no sales data yet for "offered for sale" commercial items.

(b) It forces them to concurrently meet both the commercial item determination and price reasonableness data submission

criteria, which will invite contracting officers to use the submitted cost or pricing data to actually determine initial commerciality, rather than using one or more of the current FAR 2.101 definitions of commercial items.

(c) It is a direct conflict with current FAR 15.402(a)(2) and (a)(3) for obtaining cost or pricing data from subcontractors and/or prime contractors to determine price reasonableness. The proposed rule directly conflicts with both newly proposed DFARS 212.209 and FAR 15.402 provisions.

Another respondent recommended modifying proposed DFARS 252.215-7010(b)(1)(ii) to separate a commercial item determination from a price reasonableness determination of a commercial item. Although this language mirrors FAR 52.215-20(a)(1)(ii), both elements are equally important to the Government's procurement of commercial items, but only the commercial item determination is necessary for an exception to submitting certified cost or pricing data. Pricing information is not solely determinative of whether a product or service is a "commercial item," yet that is the only information the proposed language requires. DoD should make improvements to FAR 52.215-20 with supplemental guidance, which not only implements the requirements of section 831 of the NDAA for FY 2013 and sections 851, 852, and 855 of the NDAA for FY 2016, but also clarifies important distinctions that are critical to DoD's commercial

item acquisition. This distinction was maintained by Congress, for a commercial item determination to be made and only then for price reasonableness to be assessed. The respondent asserted that commercial items determinations should be focused on the Government's market research and the commercial item definition in FAR 2.101, and cost or pricing data required for price reasonableness determinations should be uncertified when required by the clause to support the Government's price reasonableness determination.

Response: DoD considers commercial item determinations separately from price reasonableness determinations, however, offerors are still expected to provide adequate supporting data with their proposal submissions in order to avoid unnecessary delays in contract award. It would not be in the best interest of DoD or industry to delay acquisitions by establishing a formal two-step sequential proposal process of first requiring supporting information only for the purpose of making a commercial item determination, and then following up with a second request for information in order to make a determination of price reasonableness. In accordance with DFARS 252.215-7010, and consistent with the existing requirements of FAR 52.215-20, where commercial items are proposed in response to a solicitation, the offeror is required to concurrently submit

information that is adequate for evaluating the reasonableness of the proposed price.

7. Congressional comments on previous rule.

Comment: One respondent indicated Congressman Derek Kilmer (R-WA), wrote a letter to the Director of Defense Pricing (March 7, 2014) and voiced his concern with the application of the term "of a type" that was used to determine what is or is not a commercial item or service in certain cases. The Congressman addressed his concern with DoD's attempts to restrict "offered for sale" and "of a type" commercial item procurements, and its negative impact on the innovative defense community and the Government's defense mission. A contracting officer's commerciality determination may have long-ranging effects that impact the company's interest in investing private capital into innovation or participating in the Government marketplace. These are most likely to be dual-use and second-tier suppliers that tend to be among our most innovative and that are willing to invest their own money in development.

Another respondent indicated that Senator John McCain (R-AZ) wrote a letter to the Secretary of Defense (September 8, 2015) indicating he was deeply concerned by a new proposed DFARS CASE 2013-D034 and its ability to effectively preclude any significant participation by commercial firms in defense programs. The Senate and the House have included provisions in

the NDAA for FY 2016 to entice new firms into the defense market and retain them once there. The Senator stated that the rule would deter privately-held start-up companies from offering their products and services to DoD, because it would impose cumbersome and excessive bureaucratic requirements on these firms and require firms to build entirely new accounting systems. The respondent indicated the current rule in question does not succeed in removing the accumulated detritus of law, process, and regulation sought by Senator McCain.

Response: DoD received comments on proposed DFARS rule 2013-D034 from many respondents, including members of Congress. Based on the comments received in response to that proposed rule, and in order to implement the requirements in sections 851 through 853 and 855 through 857 of the NDAA for FY 2016, DFARS rule 2013-D034 was closed into this DFARS rule, 2016-D006.

8. Contractual limitations on information necessary to support a determination of fair and reasonable Pricing.

Comment: One respondent recommended deleting DFARS 215.402(a)(i)(B), because the language does not appear to be based on statutory authority cited under section 831 of the NDAA for FY 2013. The use of terms "any data" and "necessary supporting information" are unclear and creates confusion regarding the scope of the information the Government would require.

Another respondent recommended adding language to DFARS 215.402(a)(i)(B) to state that any provision that limits the Government's ability to obtain any information that may be necessary to support a determination of fair and reasonable pricing is void.

Response: The language at 215.402(a)(i)(B) is intended to prohibit DoD contracting officers from agreeing to contract terms that preclude obtaining supporting information that may be necessary to support a determination of fair and reasonable pricing. For clarification, the language has been revised to state that the contracting officer shall not limit the Government's ability to obtain "information..." in lieu of "any data," and is sufficient to instruct contracting officers not to agree to any such limitations.

9. Converting commercial to noncommercial.

Comment: One respondent recommended changing DFARS 212.7001(a) allowing contracting officers to either consider finding errors "or" cost savings when converting from a commercial acquisition to a noncommercial acquisition. The current language reads "and." Making this change will allow Government officials to convert the procurement when it is deemed appropriate.

Response: The language at DFARS 212.7001(a)(1)(i) and (ii) is in accordance with section 856 of the NDAA for FY 2016 and as such is unchanged.

10. Definition of "commercial item".

Comment: One respondent supported narrowing the definition of a "commercial item" to mean goods or services that are actually sold to the general public in like quantities. This change would be a huge improvement over the current definition, which includes goods or services "of a type" that are merely "offered" for sale or lease.

Response: The definition of "commercial item" is not revised under this rule since the definition is set forth in 41 U.S.C. 103, which defines "commercial item", in part, as an item, other than real property, that—

(a) Is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and

(b) Has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public.

11. Definition of "market research".

Comment: One respondent recommended amending the definition of "market research" to provide additional guidance to contracting officers to focus more directly on pricing and adequate evaluation of the fairness and reasonableness of an

offeror's proposed price. A critical component of market research—particularly for determining fair and reasonable pricing—is reviewing and understanding pricing conditions and related considerations in the relevant industry and marketplace. The respondent proposed adding the following into the definition of “market research”:

- (a) Include review of previous prices of the items.
- (b) Considering offeror's net profit margins.
- (c) Review and identify previous contract types.
- (d) Other contract terms that may have affected differences in pricing (i.e. warranties, financing, discounts).

Response: The recommended revisions are not necessary. Language within the proposed rule and sections of FAR part 10 addresses these factors and does not require change. Specific to listed factor (a), the proposed language at DFARS 215.404-1 provides a hierarchy to follow when determining what information is necessary to determine the reasonableness of price. Included in this hierarchy is a review of information on prices paid. Specific to listed factor (b), the net profit margins would require access to cost data and including this as a factor would encourage contracting officers to seek cost data before considering DFARS 212.209(c) and the order of techniques listed in DFARS 215.404-1. Specific to listed factors (c) and (d), FAR

10.002(b) (1) (iii) includes reference to customary practices, including warranty, financing, discounts, and contract types.

12. Definition of relevant sales data.

Comment: One respondent supported the concept that contracting officers should review the age, volume, and nature of transactions when considering price reasonableness information (DFARS 252.215-7010).

Response: Section 831 of the NDAA for FY 2013 requires standards to be established for determining whether information on prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price. DFARS 215.404-1, Proposal Analysis Techniques, implements the requirements of section 831 by providing guidance to contracting officers to consider the totality of relevant factors when evaluating the reasonableness of price, including the time elapsed since the prior purchase, any differences in the quantities purchased, and applicable terms and conditions.

13. Federal Supply Schedule contracts.

Comment: Two respondents recommended revising the DFARS to recognize Federal Supply Schedule (FSS) contracts as commercial. One respondent recommended deleting the requirement at DFARS 252.215-7010(b) (1) (ii) (D) that an offeror must provide proof of a commercial item exception when an item is sold via an active FSS contract, because it is redundant and unsupported by statute.

By the mere fact that items are included on FSS contracts, means that they have been determined to qualify as commercial items (see *CGI Fed. Inc. v. United States*, 779 F.3d 1346, 1353 (Fed. Cir. 2015)). In addition, the proposed rule disregards the prior work of the General Services Administration FSS contracting officers, and provisions of the NDAA do not require proof that a commercial item exemption has been granted for a schedule item.

Response: Section 851 of the NDAA for FY 2016 provided the authority for DoD contracting officers to presume that a prior commercial item determination made by a military department, a defense agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such item. This does not preclude contracting officers from applying a commercial item exception when an item is sold via an active FSS contract. However, this statutory language does not mandate that DoD contracting officers apply the same presumptions to prior commercial item determinations made by non-DoD agencies. Therefore, the language at DFARS 252.215-7010(b)(1)(ii)(D) remains unchanged.

14. Format for submission of data.

Comment: One respondent recommended revising the language that requires the offeror to provide data to the contracting officer in a format regularly maintained in the offeror's

business operations by replacing the word "operations" with the word "systems".

Response: Section 831 of the NDAA for FY 2013 requires that guidance be established to ensure that in cases in which such uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations. The language included in the rule is consistent with the language in section 831 of the NDAA for FY 2013.

15. "Of a type" items.

Comment: One respondent indicated that language in the proposed rule Federal Register notice (Section II.B., Analysis of Public Comments, on DFARS Rule 2013-D034), at Comment 3, asserts that "Regulations for CIDs [commercial item determinations] for 'of a type' ... are unchanged by this rule" is not entirely correct. Since it's a fact that the "of a type" commercial item category is the most widely used designation by innovative subcontractors, then it is also a fact that the new DFARS requirement for "concurrent" productions of cost or pricing data with a commercial item determination application will impact that class of subcontracted items the most. The proposed rule seems to be a thinly disguised major reversal of congressionally mandated direction in 2012 for DoD to procure more commercial items, especially "of a type" items.

Another respondent suggested that the rule clarify that for an "of a type" item to meet the definition of a commercial item (excluding modifications and services) there should be a two prong test: (1) The item has to be of a type that customarily used by the general public and (2) the item itself has to have been sold (leased or licensed) or offered to the general public.

Response: The language of this rule does not revise the definition of "commercial item" in FAR part 2, nor alter the requirements for commercial item determinations for "of a type" items. As stated in the response to comment 6 herein, DoD considers commercial item determinations separately from price reasonableness determinations. However, offerors are still expected to provide adequate supporting data with their proposal submissions in order to avoid unnecessary delays in contract award.

16. Major systems acquisition.

Comment: One respondent suggested the proposed rule language for major system acquisitions at DFARS 234.7002 incorporates proposal analysis techniques under DFARS 215.404-1, and provides that only a contracting officer may determine that a "subsystem, component or spare part" is a commercial item for a major weapon system. This same DFARS requirement first imposed in 2015, squarely conflicts with the older pragmatic DFARS policy requirement in DFARS 244.402 that mandates that only prime

contractors "shall determine whether a particular subcontract item meets the definition a commercial item." This will not alleviate the inevitable log jam of subcontract commercial item applications on major weapons.

Response: This is a statutory requirement under 10 U.S.C. 2379(b)(2). DFARS 244.402 does require contractors to determine whether a particular subcontract item meets the definition of commercial item. However, it explicitly states that the requirement does not affect the contracting officer's responsibilities for determinations made under FAR 15.403-1(c)(3) whereby if the contracting officer determines than an item is not commercial and no other exception or waiver applies, then the contracting officer shall require the submission of certified cost or pricing data. This authority applies to prime contracts and subcontracts.

17. Market prices.

Comment: One respondent expressed concern that the definition of "market prices" focuses on "current prices." The proposed definition could be interpreted by contracting officers to limit market prices to only those prices that have just been agreed to by a customer, and in extreme cases, only prices that are less than a few days old. Whether a price is "current enough" to be relevant varies based on many factors that are best addressed through guidance on age of data rather than within the

definition of market prices. The respondent pointed out that section 853 of the NDAA for FY 2016 uses the term "recent" in lieu of the term "current." The difference between "recent" and "current" is significant. "Recent" is having happened not long ago whereas "current" means in the present, contemporaneous, or being used or done now.

Response: Recent prices paid can be used in the determination of price reasonableness. "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain, and that can be substantiated through competition or from sources independent of the offerors. At any point in time, the market price would be the current price.

Comment: One respondent stated that for an item to be exempt from submitting certified cost or pricing data, a commercial market place should exist that allows for establishing price reasonableness. Excluding this requirement from the definition of a commercial item has created a policy for which proposed regulations have tried and failed to work around.

Response: This rule does not revise the established FAR definition of a commercial item which, in part, specifically identifies an item that "Has been offered for sale, lease, or license to the general public". Section 831 of the NDAA for FY 2013 requires that standards be established for determining the

extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price. While pricing based on market prices is the preferred method to establish a fair and reasonable price, a commercial marketplace is not required for the item to meet the definition of a commercial item. Furthermore, the rule sets forth a hierarchy of information that the contracting officer shall require to determine the reasonableness of the price, including other relevant information that can serve as the basis for a price assessment.

18. Market research.

Comment: One respondent recommends removing "where appropriate" from DFARS 212.209(a) because it injects the uncertainty that market research is conditional. Understanding the market place, even if there is limited research, is critical for commercial item determinations.

A second respondent recommended including language in the DFARS to require contracting officers to conduct market research prior to soliciting information from offerors for purposes of price reasonableness determinations of commercial items, however, another respondent opposes the use of market research to determine price reasonableness, when obtaining offeror cost or pricing data would be more time efficient and germane.

One respondent recommends that the rule specify that market research be conducted before the solicitation in order to inform the contracting officer whether a solicitation can be accommodated under FAR part 12.

Response: DoD agrees that understanding the market place, even if there is limited research, is critical for commercial item determinations. DoD disagrees that "where appropriate" indicates that it is conditional, but simply if it is appropriate at that point in the acquisition process. Market research also informs decisions at several other points in the requirements development and acquisition process, and is one of several techniques contracting officers may use to reach a conclusion regarding price reasonableness.

Market research is conducted at several points in the acquisition process, and that is adequately covered in FAR 10.001(a)(2) as well as in this rule. Market research is first conducted by the Requirements Community in developing requirements. The Acquisition Community builds upon initial market research in development of the acquisition strategy and drafting of the solicitation. However, additional focused market research is again conducted during the pricing and proposal analysis phase.

19. Modified and similar items.

Comment: One respondent stated that under FAR 15.403-1, if a minor modification of a commercial item exceeds the greater of the threshold for obtaining certified cost or pricing data or 5 percent of the total price of the contract, certified cost or pricing data are required. The respondent questioned whether equivalent requirements apply to price reasonableness assessments based on a "similar" item. The respondent believes that conceptually it seems it should. The respondent further questioned if there is a difference between a "similar" item and an item that has been modified, and whether a "similar" item can be an unmodified item of the item being purchased.

Another respondent suggested that the rule define a "similar" item as an item that is so sufficiently comparable in technical and physical characteristics that the differences in price due to those differences is not material to the assessment of price reasonableness. The respondent further stated that if significant price differences are allowed for similar items, there seems no meaningful way to distinguish similar items from modified items.

One respondent stated that in practice one of the biggest obstacles to determine price reasonableness on commercial items is the physical differences between the item being acquired and the item for which sales data is provided. It is difficult for the Government or contractor personnel to assess the price

impact, with any level of fidelity, of the physical differences without associated price or cost data. Parametric models typically generate values with a gross level of precision, especially when using data from sources external to the manufacturer. The respondent suggested that the rule address data required for modifications of an item to include the technical or physical differences and the associated price or cost impact of each. The respondent further suggested that the rule address data required for "similar" items to include the technical or physical differences and the associated price or cost impact of each; including the data requirements for subcontractors in 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. This would be required to validate that the physical differences do not have a price impact.

Response: The rule provides the ability for contracting officers to obtain necessary data to determine price reasonableness. Consistent with FAR 15.403-1(b)(3), contracting officers shall not request certified cost and pricing data when a commercial item is being acquired, but may require data other than certified cost and pricing data as defined in FAR 2.101 to support a determination of a fair and reasonable price. The rule does not define "similar items" for the purposes of determining price reasonableness, but authorizes contracting

officers, when appropriate, to require the contractor to supply information that is sufficient to determine the reasonableness of price, including information showing the similar item is comparable to the item being purchased to be used as a comparison in price reasonableness. Since no two contract actions are exactly the same, the rule provides a broad framework for data requirements. Contracting officers must use business judgement and consider all relevant factors including the similarity of items when making comparisons for the purposes of determining price reasonableness. Further information on the comparison of same or similar items may be found at FAR 15.404-1(b)(2)(ii).

20. Non-governmental entities.

Comment: One respondent recommended adding the term "non-governmental entities" into the rule where data is considered based on sales to the Government and commercial customers.

Response: The language of this rule is consistent with the preexisting terminology in the DFARS.

21. Nontraditional defense contractors.

Comment: One respondent recommended elimination of the permissive nature of this authority. The respondent further recommended deletion of the language stating that the use of commercial item procedures under this authority does not mean the item is commercial, stating that this additional direction

adds uncertainty for nontraditional contractors for renewal contracts and could adversely impact their initial decision to sell to DoD.

Additionally, two respondents recommended clarifying that "subcontractors" be added to the definition of nontraditional defense contractors so that items provided by a subcontractor that meet the definition of a "nontraditional defense contractor" may be treated as commercial items.

Response: Section 857 amended 10 U.S.C 2380a to provide DoD with the permissive authority to treat items and services provided by nontraditional defense contractors as commercial items. This authority was neither mandatory nor was it extended to prime contractor commercial item determinations for subcontracted items and services.

Comment: One respondent recommended broadening the statement of intent in DFARS 212.102(a)(iv) to state: "This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for qualified firms to do business with DoD."

The respondent further recommended an editorial revision to state "...does not require a commercial item determination..." in lieu of "...does not constitute a requirement for a commercial item determination..."

Response: DoD concurs with the recommended revisions and has revised DFARS 212.102(a)(iii) accordingly. In addition, the DFARS provision 252.215-7013, Supplies and Services Provided by Nontraditional Defense Contractors, has been added to advise offerors that in accordance with 10 U.S.C. 2380a, supplies and services provided by a nontraditional defense contractor, as defined in DFARS 212.001, may be treated as commercial items.

22. Order of preference for determining price reasonableness.

Comment: One respondent recommended changing DFARS 215.404-1 to clearly conform to the order of preference in FAR 15.402(a) in determining the sources, order and type of data needed to adequately determine price reasonableness. The respondent asserts that listing "market research" as first in the order of preference gives the contracting officer unintended discretion to determine whether any market research is even appropriate. The respondent stated that the proposed rule side-steps the FAR 15.402 cost or pricing threshold and data exceptions as well as the requirement to rely on data available within the Government before going through market research, and demands, at a minimum up-front, information on prices at which the same or similar items have been sold in the commercial market (via DFARS Clause 252.215-7010).

Response: This rule establishes DFARS language to supplement the requirements of the FAR, including the requirements at FAR

15.402. It does not establish a different order of preference in determining the sources, order, and type of data needed to adequately determine price reasonableness. Per FAR 10.001, agencies must conduct market research (appropriate to the circumstances) before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold.

23. Price analysis.

Comment: One respondent indicated the proposed rule would require prime contractors to obtain whatever information necessary from subcontractors to support concurrent commercial item determinations and price realism analyses. This requirement will more likely create disputes between prime contractors and subcontractors regarding the types of information necessary to support a subcontractor's commercial item assertion. Further, the respondent expressed concern that the rule gives DoD the subjective ability to effectively challenge the prime contractor's costs incurred for commercial item subcontracts under cost-type contracts, and provides fodder for DoD to challenge the adequacy of a prime contractor's purchasing system.

Response: The standards for what information is necessary to make commercial item determinations and determinations of price reasonableness should not be relaxed for subcontractors. Prime

contractors are responsible for exercising the same due diligence as DoD contracting officers in making subcontractor commercial item determinations and evaluating their subcontractors' price reasonableness.

Comment: One respondent recommended changing DFARS 215.404-1(b)(ii) to allow contracting officers to consider recent purchase prices paid by both the Government "and" commercial customers for the same or similar commercial items. The current language reads "or". Making this change can give Government officials access to both, which can ensure the Government is obtaining the best prices.

Response: DoD concurs with the respondent's recommendation and has incorporated this revision in the final rule in DFARS 212.209(b) and 215.404-1(b)(ii).

24. Price analysis techniques.

Comment: One respondent suggested expanding DFARS 212.209 and 215.404-1(b)(ii) to reference FAR 15.404 that lists the various price analysis techniques and procedures to ensure a fair and reasonable price.

Response: It is not necessary to reiterate the various price analysis techniques and procedures in FAR 15.404 in this rule.

25. Price reasonableness determinations.

Comment: One respondent recommended that DFARS 252.215-7010(d) be revised to require only the minimum data necessary to

support a determination that the proposed price is fair and reasonable instead of requiring all data necessary to support such a determination.

Response: To ensure contracting officers request only the data necessary to permit a determination that the proposed price is fair and reasonable, the language has been revised to state "the minimum information" instead of "all data." However, this does not relieve the requirement that offerors submit minimum essential information necessary to determine that the proposed price is fair and reasonable.

Comment: One respondent recommended changing DFARS 212.209(d), 215.404-1(b)(iv), and 234.7002(d)(3) to state the contracting officer "shall request" the offeror to submit other relevant information, including uncertified cost data instead of the current language "may request." This change clears up confusion, especially when contractors refuse to turn over cost data to DoD. Since the proposed rule limits DoD's access to uncertified cost data to that which is regularly maintained by the offerors in its business operations, there should be no additional burden on contractors.

Response: DoD concurs that DFARS 215.404-1(b)(iv) and 234.7002(d)(3) should be changed to "shall" in accordance with the language in the NDAA for FY 2016.

26. Prior commercial item determination.

Comment: One respondent recommended adding the requirement under DFARS 212.102 that a prior commercial item determination will remain if the contracting activity fails to provide a written explanation of the basis for the revision within the 30 day review period.

Response: This rule will not impose such a time constraint on commercial item determinations.

Comment: Two respondents recommended that a prior commercial item determination made by a prime contractor shall serve as a determination for subsequent procurements of such item. One respondent recommended adding to DFARS 212.102(a)(iii)(A) that the contracting officer shall "also" presume that a prior commercial item determination made by a prime contractor for a subcontracted item (pursuant to the mandate of DFARS 244.402(a) Policy Requirements), shall serve as a determination for subsequent procurements of such subcontracted item either by the prime contractor or directly by the Government as a spare part.

Three respondents recommended further consistency and uniformity in the acquisition process by allowing the contracting officer to consider prior commercial items determinations made by "any" federal department or agency, including civilian agencies, departments and components not only DoD Agencies, or another component of DoD as stated under 212.102(a)(iii). The proposed provisions implement and are

consistent with 10 U.S.C. 2306(a)(b)(4), however, this recommendation is not prohibited by section 851 of the NDAA for FY 2016.

Response: 10 U.S.C. 2306a(b)(4)(A) states that for purposes of applying the commercial item exception under paragraph (1)(B) to the required submission of certified cost or pricing data, the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. This statutory language does not extend this authority to prior determinations made by prime contractors or civilian agencies.

Comment: One respondent recommended adding a DFARS provision that clearly separates commercial item determinations of "end items/weapons" by the contracting officer from commercial item determinations by prime contractors of subcontractor subsystems and components. This addition will streamline commercial item procurements.

Response: This rule does not alter prime contractors' responsibility for making subcontractor commercial item determinations and evaluating their subcontractors' price reasonableness, regardless of whether the end item has or has not been determined to be a commercial item.

Comment: One respondent suggested DFARS 212.102(a)(iii)(A) can lock DoD into buying items that are no longer commercial, and that requiring commercial item determinations as listed under DFARS 212.102(a)(iii)(B) and (C) can slow down the process by taking up to 30 days.

Response: DoD contracting officers remain responsible for adhering to the definition of commercial items set forth in 41 U.S.C. 103 and applying professional judgement in making commercial item determinations as expeditiously as possible. To that end, DoD has stood up a DCMA cadre of experts to assist contracting officers in making commercial item determinations.

27. Prior commercial sales.

Comment: One respondent recommended that the rule be revised to permit contracting officers to accept prior FAR part 12 contract numbers from the offeror to demonstrate prior commercial item determinations.

Response: Contracting officers must validate a previous commercial item determination and document the file appropriately. DoD agrees with the respondent that the identification of contract numbers is beneficial. In accordance with DFARS 252.215-7010, for items previously determined to be commercial, offerors are required to identify the contract and military department, defense agency, or another DoD component that rendered such determination. To expedite the commercial

item determination, this language has been revised to include the contract number and, if available, a Government point of contact. Additionally, offerors are also required to provide information that is adequate for evaluating the reasonableness of the price for the acquisition.

28. Proposal analysis techniques.

Comment: One respondent suggested DFARS 215.404-1 doesn't incorporate the NDAA for FY 2016 section 855 "preference" for pricing based upon existing market prices. The respondent asserts that the proposed rule includes a cornucopia of market research and relevance "factors" that are confusing and will be extremely burdensome and time consuming for contractors, innovative subcontractors, and the Government.

Response: The language at DFARS 215.404-1 states that "In the absence of adequate price competition in response to the solicitation, pricing based on market prices is the preferred method to establish a fair and reasonable price." This rule implements requirements from both the NDAA for FYs 2013 and 2016. Having the guidelines required by section 831 of the NDAA for FY 2013 should help contracting officers to know what information to request and also help contractors, as the data will be limited to the minimum necessary to make a determination of price reasonableness.

29. Revised commercial item determination.

Comment: One respondent recommended requiring that a revised commercial item determination be provided to the offeror.

Response: Offerors will be notified of the results of any commercial item redetermination during the negotiation process.

30. Right to examine offeror data.

Comment: Two respondents believed that offerors should be exempt from the requirement in DFARS 252.215-7010(b)(2) to submit data to support proposed prices based on catalog or market prices, or those prices set by law or regulation in accordance with the limitations set forth under FAR 52.215-20(a)(2).

Another respondent is concerned that the language at DFARS 252.215-7010(b)(2), which grants DoD the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for a commercial item exception, and to determine the reasonableness of price, will negatively impact the entry of large and small commercial firms into the defense sector, impeding innovation and reducing competition.

Response: Section 831 of the NDAA for FY 2013 requires that standards be established for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price. To that extent, the rule sets forth a

hierarchy of information that the contracting officer shall require to determine the reasonableness of the price, including other relevant information that can serve as the basis for a price assessment.

31. Rule origination.

Comment: One respondent suggested an investigation be conducted of how or who originated this proposal and how high up in the DoD hierarchy there is an understanding of how this proposal subverts congressional mandates.

Response: This rule implements sections of the NDAA's for FYs 2013 and 2016 relating to commercial item acquisitions, and is consistent with Congressional intent as set forth in statute.

32. Significant economic impact.

Comment: One respondent strongly believed the proposed rule goes much further than implementing section 831(a) of the NDAA for FY 2013 and sections 851-853, 855-857 of the NDAA for FY 2016. The respondent asserts that the requirement for submission of cost or price data concurrently with a contractor's commercial item determination request under DoD-funded prime contracts and commercial subcontracts would impose significant time and paperwork burdens on prime contractors for submission to the contracting officer. Although section IV. of this preamble indicates there will be no significant economic impact on a substantial number of entities, the converse is

true. It is a major rule which will have a significant adverse effect on competition, investment and innovation, especially in the innovative subcontractor market place. In addition, the respondent states that commercial items merely "offered for sale" in the commercial market are implicitly excluded from ever getting a positive commercial item determination because they can't meet their DFARS clauses "minimum" prior sales data standard.

Response: There is no minimum prior sales standard that impacts the determination of commerciality. If an offeror does not have sales data to submit, the rule provides a list of other data that may be submitted, such as prices paid for similar levels of work or effort on related products or services. As previously stated, offerors are expected to provide adequate supporting data with their proposal submissions. It would not be in the best interest of DoD or industry to delay acquisitions by establishing a formal two-step sequential proposal process of first requiring supporting information only for the purpose of making a commercial item determination, and then following up with a second request for information in order to make a determination of price reasonableness. The rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

33. Sole source commercial acquisitions.

Comment: One respondent suggested that this proposed rule be further amended to address the situation of sole source commercial item acquisitions where market prices do not accurately reflect fair and reasonable prices due the lack of competition and the Government's bulk buys.

Response: If the contracting officer determines that the information obtained through market research is not sufficient, the contracting officer will follow the order of preference and request additional data until there is sufficient information to determine price reasonableness.

34. Solicitation provision.

Comment: One respondent recommended that the final rule incorporate the alternate version of DFARS solicitation provision 252.215-7010 in lieu of the proposed basic version of the provision to facilitate the ability of commercial companies that have an item not granted an exception to support the determination of price reasonableness with their commercial business systems.

Response: Both the basic and alternate versions of the provisions are required. Contracting officers shall use the basic provision when submission of certified cost or pricing data is required to be in the FAR Table 15-2 format, or if it is anticipated, at the time of solicitation, that the submission of

certified cost or pricing data may not be required. Contracting officers shall use the alternate I provision to specify a format for certified cost or pricing data other than the format required by FAR Table 15-2.

35. Subcontract cost or pricing data flowdown requirements.

Comment: One respondent believed that the requirement for subcontractors to provide certified cost or pricing data and for data other than certified cost or pricing data is outside the scope of section 831 of the NDAA for FY 2013 because:

(a) Subcontract pricing has no bearing on the commercial price offered to the Government.

(b) In a fixed-price type commercial transaction, the prime contractor bears all the risk of subcontract price increases.

(c) There is little incentive for the offeror's commercial subcontractors to provide information necessary to support price reasonableness.

(d) Due to the nature of commercial supply chains, the fluidity of subcontractors is a common occurrence. With the increased use of electronic auctions and reverse auctions on commodities and basic services, the flowdown requirement regarding proposal preparation and evaluation to first-tier subcontractors would be problematic from a compliance standpoint.

(e) It is exponentially more difficult to flow down to subcontractors at all tiers, as many lower-tier subcontracts may not be negotiated at the same time as the prime contract.

(f) There is no way to flow down a solicitation provision in a "subcontract" because there isn't a subcontract yet.

(g) The requirements for certified cost or pricing data are flowed down to all lower-tier subcontractors above the certified cost or pricing data threshold without exception, despite the fact that many subcontracts may qualify for an exemption from certified cost or pricing data due to competition or commercial item status.

(h) The rule requires subcontractors to submit detailed data to support subcontract pricing for all subcontracts exceeding the simplified acquisition threshold, without any rationale or determination that such detailed data is necessary or relevant to the prices proposed by the prime.

(i) The contractor purchasing processes will require substantial changes to deal with this issue and for those commercial companies not so conversant on Government regulations.

(j) This is a significant cost driver and runs counter to Better Buying Power.

(k) FAR 52.215-20, the regulation that the proposed rule would replace, does not contain special rules for subcontracts.

(l) If the commercial item meets the Government's requirement and is determined to have a fair and reasonable price, there is little incentive for offeror's commercial subcontractors to provide "information necessary to support price reasonableness." In a commercial marketplace, the Government's buying power or position is not significant enough to garner unique pricing data not customarily provided to commercial buyers.

(m) There is little justification to propose a DoD-unique subcontract price evaluation requirement as part of a rule to address Congressional direction on standards and limitations of cost data to support commercial pricing at the prime contract level.

The respondent further suggested that if the requirement for the offeror to provide data from subcontractors is retained, the final rule should exempt firm-fixed price contracts from this requirement.

Response: Section 831 of the NDAA for FY 2013 does not relieve prime contractors from their responsibility for exercising the same due diligence as DoD contracting officers in making subcontractor commercial item determinations and evaluating their subcontractors' price reasonableness.

36. Supporting information.

Comment: One respondent recommended deleting the ten-day requirement for offerors to provide additional information to

support proposal analysis in the DFARS provision 252.215-7010(d)(4).

Response: The ten-day requirement is reasonable for offerors to provide additional data consistent with similar time limitations cited in the FAR and DFARS. Since the source selection process is time constrained, it is appropriate to impose a time limit on the provision of information to be considered in the source selection process.

37. Uncertified cost data.

Comment: One respondent asserted that the term "uncertified cost data" is inconsistent with the statutory language and recommended that the term be deleted from the rule.

Response: Section 831 of the NDAA for FY 2013 requires that standards be established for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price. Section 852 of the NDAA for FY 2016 further provides language on information submissions regarding the basis for price. The rule defines "uncertified cost data" as the subset of data other than certified cost or pricing data that relates specifically to cost data. The term "uncertified cost data" is included as a subset to reinforce that cost data may be requested as a last resort after pricing data has been determined to be insufficient to determine the price

reasonableness. For consistency in terminology, this rule uses the term "uncertified cost data" in lieu of the term "uncertified cost information" as used in section 831.

Comment: One respondent stated that the language at DFARS 215.404-1 suggests a prohibition against obtaining other than certified cost or pricing data when there may only be a miniscule amount of nongovernment sales. The respondent suggested that the proposed rule should highlight instead that the Government should consider any cost data in its possession and seek additional cost data as permitted elsewhere in the regulations.

Response: The rule does not preclude the contracting officer from considering any cost data. DFARS 215.404-1 provides that if the contracting officer determines that the pricing information submitted is not sufficient to determine the price reasonableness, the contracting officer may request other relevant information, to include cost data. The language does not create a prohibition, but does provide a hierarchy that includes incorporation as to when to request other relevant information. Additional references within the rule, to include DFARS 212.209(d), provide that nothing in the section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of the price. This would further reinforce

that there is not a prohibition in place to restrict obtaining other than certified cost or pricing data when necessary to determine price reasonableness.

Comment: One respondent is concerned that the proposed rule leaves open a very favorite information shielding mechanism for contractors, insofar as it does not require contractors to disclose, in meaningful detail, the actual terms and conditions at which other buyers have acquired their commercial products. The respondent suggested that since information provided to the Government is protected from unwarranted disclosure under various federal procurement and data protection statutes, there is no valid reason why the regulations cannot require sharing of the actual commercial sales terms and conditions, as well as prices paid and identities of the purchasers.

Response: DoD agrees that that terms and conditions are frequently included in public websites and in catalogues for the prospective purchaser. Similarly, it is reasonable to require the offeror to provide terms and conditions as well as the price to support an informed and efficient decision by the contracting officer, whether the commercial procurement is competed or a sole source commercial acquisition. However, this comment is covered in DFARS 215.404-1(b)(iv) which states, "If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of

price, the contracting officer shall request other relevant information, to include cost data."

38. Volume and completeness of transaction data.

Comment: One respondent recommended revising the definition of "Volume and completeness of transaction data" to remove the requirement to identify the customer as part of the key information. Further, the respondent recommended adding the phrase "to the extent it is reasonably available and can be released by the offeror." Many commercial customer sales agreements contain non-disclosure provisions that restrict the seller's ability to disclose contract information, including customer identity, outside of the organization. These confidentiality provisions are extremely common in business-to-business agreements due to the fact that the identity of a business's suppliers and the prices paid to those suppliers is competitively sensitive information. A supplier may determine that price information may be disclosed so long as the customer's identity is not included with the disclosure, however requiring that both the price and the customer be identified puts the supplier at risk of violating contractual agreements with other customers. Using the phrase "released by the offeror" will allow the current practice of allowing the contracting officer to view un-redacted invoices (but not

physically collect them) to ensure the data provided to the Government supports price reasonableness.

Response: The language states "customer" but does not state "customer name." It is relevant to the contracting officer whether the customer is a commercial customer versus a Government customer. The subsequent paragraph provides further clarification that the DoD contracting officer needs to understand the type of customer. Nothing prohibits the current practice that the DoD contracting officer can travel onsite to review un-redacted invoices.

39. Out of scope comments.

Comment: One respondent commented on the affordability of technology. Another respondent stated that 100% of U.S. Government requirements should be purchased from U.S. small businesses.

Response: Both of these comments are beyond the scope of this rule.

III. Applicability to Commercial Item Acquisitions

The objective of this rule is to implement sections 851 through 853 and 855 through 857 of the NDAA for FY 2016 and section 831 of the NDAA for FY 2013. Sections 831, 851, and 853 address requirements related to commercial items. The statutes are silent on applicability to contracts for the acquisition of commercial items or commercially-available-off-the shelf (COTS)

and do not provide for criminal or civil penalties. Therefore, sections 831, 851, and 853 do not apply to the acquisition of commercial items unless the Director, Defense Procurement and Acquisition Policy (DPAP) makes a written determination as provided in 41 U.S.C. 1906 to apply the statutes for commercial items and 41 U.S.C. 1907 for COTS items. Consistent with 41 U.S.C. 1906 and 1907, the Director, DPAP, has determined that it is in the best interest of DoD to apply sections 831, 851, and 853 to the acquisition of commercial items.

IV. Expected Cost Savings

This final rule prescribes the use of a new DFARS provision 252.215-7010, to be used in lieu of FAR provision 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. The new DFARS provision includes the existing requirement under FAR provision 52.215-20 for offerors to submit certified cost and pricing data and data other than certified cost or pricing data, as appropriate; however, the new DFARS provision adds levels of granularity to assist offerors in their proposal preparation with regards to "other than certified cost or pricing data" and implements a statutory exemption to the requirement for "certified cost or pricing data" for nontraditional defense contractors.

This rule will impact large businesses and small entities who currently compete on DoD solicitations issued using FAR part 15,

Negotiation Procedures, and are valued at \$750,000 or more. Offerors competing on contracts and orders subject to the new DFARS provision, will have the benefit of additional details on (and a hierarchy of) the types of "other than certified cost or pricing data" that they should consider including in their proposal. This information has the potential to improve the quality of proposals from businesses and reduce resubmissions of data during negotiations. In addition, this rule adds a statutory exemption from the requirement to submit "certified cost or pricing data" for nontraditional defense contractors, who may now "other than certified cost or pricing data," which takes less time to prepare.

Finally, this rule also advises contracting officers that they may presume that a prior commercial item determination made another DoD component shall serve as a determination for subsequent procurements of such items, unless the contracting officer obtains a determination from the head of the contracting activity that the item is not commercial and the basis for that decision.

DoD has performed a regulatory cost analysis on this rule. The following is a summary of the estimated public cost savings in millions, which are calculated in 2016 dollars at a 3-percent and 7-percent discount rate:

Present Value at 3%:	\$4.4
Annualized at 3%:	\$0.1
Present Value at 7%:	\$1.6
Annualized at 7%:	\$0.1

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for "DFARS Case 2016-D006," click "Open Docket," and view "Supporting Documents."

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in Section IV. of this rule.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been performed and is summarized as follows:

This rule amends the DFARS to provide additional guidance to contracting officers on making price reasonableness determinations, expand opportunities for nontraditional defense contractors to do business with DoD, and provide additional details on the types of "other than certified cost or pricing data" that offerors should include in their proposal in order to for the purposes of determining whether proposed prices for commercial items are fair and reasonable. The objective of this rule is to implement the requirements of sections 851 through 853 and 855 through 857 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92, enacted November 25, 2015), as well as the requirements of section 831 of the NDAA for FY 2013 (Pub. L. 112-239, enacted January 2, 2013) and section 848 of the NDAA for FY 2018 (Pub. L. 115-91, enacted December 12, 2017).

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will apply to contractors that compete for contracts being awarded using FAR part 15 Negotiation procedures that are valued at \$750,000 or more. According to data available in the Federal Procurement Data System for FY 2016, DoD awarded approximately 6,865 contracts meeting this criteria to 5,105 unique contractors, of which 4,544 contracts (~66 percent) were to 3,536 (~70 percent) unique small businesses.

DoD does not expect this rule to have a significant impact on the small businesses that may be affected by this rule, because the rule does not add to or remove any of the existing requirements for the submission of other than certified cost or pricing data for the purpose of determining the reasonableness of prices proposed for commercial items. Rather the rule provides offerors additional details and a hierarchy of the "other than certified cost or pricing data" that should be included in their proposals. This additional detail could reduce the amount of time it takes a small business resubmit data during negotiations. In addition, the exception to "certified cost or pricing data" for nontraditional defense contractors would be of benefit to small businesses that meet the definition.

There are no significant alternative approaches to the rule that would meet the requirements of the statute.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 202, 212, 215, 234, 239, and 252

Government procurement.

Jennifer L. Hawes,

Regulatory Control Officer

Defense Acquisition Regulations System.

Therefore, 48 CFR parts 202, 212, 215, 234, 239, and 252 are amended as follows:

1. The authority citation for parts 202, 212, 215, 234, 239, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 202— DEFINITIONS OF WORDS AND TERMS

2. Amend section 202.101 by adding, in alphabetical order, the definitions of "non-Government sales", "sufficient non-Government sales", and "uncertified cost data" to read as follows:

202.101 Definitions.

* * * * *

Non-Government sales means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

* * * * *

Sufficient non-Government sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

* * * * *

Uncertified cost data means the subset of "data other than certified cost or pricing data" (see FAR 2.101) that relates to cost.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Section 212.001 is added above subpart 212.1 to read as follows:

212.001 Definitions.

As used in this part—

Market research means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part.

The review shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities and pricing information, and may include any of the techniques for conducting market research provided in FAR

10.002(b) (2) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

Nontraditional defense contractor means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

4. Amend section 212.102 by—

- a. Adding a paragraph (a)(i) heading;
- b. Redesignating paragraph (a)(ii) as (a)(i)(D) and revising the newly redesignated paragraph (a)(i)(D); and
- c. Adding new paragraphs (a)(ii) and (a)(iii).

The revision and additions read as follows:

212.102 Applicability.

(a)(i) Commercial item determination. * * *

* * * * *

(D) Follow the procedures and guidance at PGI

212.102(a)(i) regarding file documentation and commercial item determinations.

(ii) Prior commercial item determination. This section implements 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(b).

(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. See PGI 212.102(a)(ii) for information about items that the Department has historically acquired as military unique, noncommercial items.

(B) If the contracting officer does not make the presumption that a prior commercial item determination is valid, and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review of a commercial item determination, the head of a contracting activity shall—

(1) Confirm that the prior determination was appropriate and still applicable; or

(2) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination (see 212.70).

(iii) Nontraditional defense contractors. In accordance with 10 U.S.C. 2380a, contracting officers may treat supplies and

services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of "nontraditional defense contractor" even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial.

5. Section 212.209 is added to read as follows:

212.209 Determination of price reasonableness.

(a) Market research shall be used, where appropriate, to inform price reasonableness determinations.

(b) If the contracting officer determines that the information obtained through market research pursuant to paragraph (a) of this section, is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and

commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. In assessing whether the prices previously paid remain a valid reference for comparison, the contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)).

(c) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

(1) Prices paid for the same or similar items sold under different terms and conditions;

(2) Prices paid for similar levels of work or effort on related products or services;

(3) Prices paid for alternative solutions or approaches; and

(4) Other relevant information that can serve as the basis for determining the reasonableness of price.

(d) Nothing in this section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of

price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement. If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information regarding the basis for price or cost, including uncertified cost data such as labor costs, material costs, and other direct and indirect costs.

6. Amend section 212.301 by adding paragraph (f)(vi)(E) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vi) * * *

(E) Use the provision 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, as prescribed at 215.408(6)(i) to comply with section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and sections 851 and 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(1) Use the basic provision as prescribed at 215.408(6)(i)(A).

(2) Use the alternate I provision as prescribed at 215.408(6)(i)(B).

* * * * *

7. Add subpart 212.70 to read as follows:

Subpart 212.70—Limitation on Conversion of Procurement from Commercial Acquisition Procedures

Sec.

212.7000 Scope.

212.7001 Procedures.

Subpart 212.70—Limitation on Conversion of Procurement from Commercial Acquisition Procedures

212.7000 Scope.

This subpart implements section 856 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

212.7001 Procedures.

(a) Limitation. (1) For a procurement valued at more than \$1 million, but less than \$100 million, previously procured under a prime contract using FAR part 12 procedures based on a commercial item determination made by a military department, a defense agency, or another DoD component, prior to converting the procurement from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, the head of the contracting activity shall determine in writing, upon recommendation from the contracting officer for the procurement that—

(i) The earlier use of commercial acquisition procedures under FAR part 12 was in error or based on inadequate information; and

(ii) DoD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.

(2) In the case of a procurement valued at \$100 million or more, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (a) (1) of this section until a copy of the head of contracting activity determination is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) In making a determination under paragraph (a) of this section, the determining official shall, at a minimum, consider the following factors:

(1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.

(2) The costs for DoD and the contractor in assessing and responding to data requests to support a conversion to noncommercial acquisition procedures.

(3) Changes in purchase quantities.

(4) Costs associated with potential procurement delays resulting from the conversion.

(c) The requirements of this subpart terminate November 25, 2020.

PART 215—CONTRACTING BY NEGOTIATION

8. Section 215.401 is added to subpart 215.4 to read as follows:

215.401 Definitions.

As used in this subpart—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

9. Amend section 215.402 by—

- a. Redesignating the existing text as paragraph (a)(ii); and
- b. Adding paragraph (a)(i).

The addition reads as follows:

215.402 Pricing policy.

(a)(i) Pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)—

(A) The contracting officer is responsible for determining if the information provided by the offeror is sufficient to determine price reasonableness. This responsibility includes determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price, and determining the extent of uncertified cost data that should be required in cases in which price information is not adequate;

(B) The contracting officer shall not limit the Government's ability to obtain any data that may be necessary to support a determination of fair and reasonable pricing by agreeing to contract terms that preclude obtaining necessary supporting information; and

(C) When obtaining uncertified cost data, the contracting officer shall require the offeror to provide the information in the form in which it is regularly maintained in the offeror's business operations.

* * * * *

10. Amend section 215.403-1 by adding paragraph (c)(3)(C) to read as follows:

215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(3) * * *

(C) When applying the commercial item exception under FAR 15.403-1(b)(3), see 212.102(a)(ii) regarding prior commercial item determinations.

* * * * *

11. Amend section 215.404-1 by-

a. Redesignating paragraphs (1), (2), and (2)(i) through (iv) as paragraphs (a)(i), (a)(ii), and (a)(ii)(A) through (D), respectively;

b. Adding a paragraph (a) heading; and

c. Adding paragraph (b).

The additions read as follows:

215.404-1 Proposal analysis techniques.

(a) General. (i) * * *

* * * * *

(b) Price analysis for commercial and noncommercial items. (i)

In the absence of adequate price competition in response to the solicitation, pricing based on market prices is the preferred method to establish a fair and reasonable price (see PGI 215.404-1(b)(i)).

(ii) If the contracting officer determines that the information obtained through market research is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent

purchase prices paid by the Government and commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. The contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (section 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

(iii) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b)(ii) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

(A) Prices paid for the same or similar items sold under different terms and conditions;

(B) Prices paid for similar levels of work or effort on related products or services;

(C) Prices paid for alternative solutions or approaches;
and

(D) Other relevant information that can serve as the basis for determining the reasonableness of price.

(iv) If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer shall request other relevant information, to include cost data. However, no cost data may be required in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price (section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239)).

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors. For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (see FAR 15.404-1(b)(2)(ii)(B) and PGI 215.404-1(b)(v)). Material differences are those that could reasonably be expected to influence the contracting officer's determination of price reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

(A) Market prices.

(B) Age of data.

(1) Whether data is too old to be relevant depends on the industry (e.g., rapidly evolving technologies), product

maturity (e.g., stable), economic factors (e.g., new sellers in the marketplace), and various other considerations.

(2) A pending sale may be relevant if, in the judgement of the contracting officer, it is probable at the anticipated price, and the sale could reasonably be expected to materially influence the contracting officer's determination of price reasonableness. The contracting officer may consult with the cognizant administrative contracting officers (ACOs) as they may have information about pending sales.

(C) Volume and completeness of transaction data. Data must include a sufficient number of transactions to represent the range of relevant sales to all types of customers. The data must also include key information, such as date, quantity sold, part number, part nomenclature, sales price, and customer. If the number of transactions is insufficient or the data is incomplete, the contracting officer shall request additional sales data to evaluate price reasonableness. If the contractor cannot provide sufficient sales data, the contracting officer shall request other relevant information.

(D) Nature of transactions. The nature of a sales transaction includes the information necessary to understand the transaction, such as terms and conditions, date, quantity sold, sale price, unique requirements, the type of customer (government, distributor, retail end-user, etc.), and related agreements. It

also includes warranties, key product technical specifications, maintenance agreements, and preferred customer rewards.

(vi) The contracting officer shall consider catalog prices to be reliable when they are regularly maintained and supported by relevant sales data (including any related discounts, refunds, rebates, offsets, or other adjustments). The contracting officer may request that the offeror support differences between the proposed price(s), catalog price(s), and relevant sales data.

(vii) The contracting officer may consult with the DoD cadre of experts who are available to provide expert advice to the acquisition workforce in assisting with commercial item and price reasonableness determinations. The DoD cadre of experts is identified at PGI 215.404-1(b) (vii).

12. Amend section 215.408 by—

- a. In paragraph (3) (i) (A) introductory text, removing “Requirement for Data” and adding “Requirement for Submission of Data” in its place;
- b. In paragraph (3) (i) (A) (1) introductory text, removing “FAR 52.215-20, Requirement for” and adding “DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and” in its place;
- c. In paragraph (3) (i) (A) (2), removing “FAR 52.215-20” and adding “DFARS 252.215-7010” in its place;
- d. Revising paragraph (3) (i) (B);

e. In paragraph (3)(ii)(A) introductory text, removing "Requirement for Data" and adding "Requirement for Submission of Data" in its place; and

f. Adding paragraphs (6) and (7).

The revision and additions read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) * * *

(i) * * *

(B) Do not use 252.225-7003 in lieu of DFARS 252.215-7010 in competitive acquisitions; and

* * * * *

(6) When reasonably certain that the submission of certified cost or pricing data or data other than certified cost or pricing data will be required—

(i) Use the basic or alternate of the provision at 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in lieu of the provision at FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(A) Use the basic provision when submission of certified cost or pricing data is required to be in the FAR Table 15-2

format, or if it is anticipated, at the time of solicitation, that the submission of certified cost or pricing data may not be required.

(B) Use the alternate I provision to specify a format for certified cost or pricing data other than the format required by FAR Table 15-2;

(ii) Use the provision at 252.215-7011, Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor, when using the basic or alternate of the provision at 252.215-7010 and copies of the proposal are to be sent to the ACO and contract auditor; and

(iii) Use the provision at 252.215-7012, Requirements for Submission of Proposals via Electronic Media, when using the basic or alternate of the provision at 252.215-7010 and submission via electronic media is required.

(7) Use the provision at 252.215-7013, Supplies and Services Provided by Nontraditional Defense Contractors, in all solicitations.

PART 234—MAJOR SYSTEM ACQUISITION

13. Amend section 234.7002 by—

a. In paragraph (a)(1)(i)(B), adding the word “and” after the semicolon;

b. Removing paragraph (a)(1)(ii);

c. Redesignating paragraph (a)(1)(iii) as paragraph (a)(1)(ii);

- d. In paragraph (b) introductory text, removing "may" and adding "shall" in its place, and removing "only if—" and adding "if—" in its place;
- e. Revising paragraph (b) (2);
- f. In paragraph (c) (1) introductory text, removing "only if—" and adding "if—" in its place;
- g. Revising paragraph (c) (1) (ii); and
- h. Revising paragraph (d).

The revisions read as follows:

234.7002 Policy.

* * * * *

(b) * * *

(2) The contracting officer determines in writing that the subsystem is a commercial item.

(c) * * *

(1) * * *

(ii) The contracting officer determines in writing that the component or spare part is a commercial item.

* * * * *

(d) Relevant information. This section implements 10 U.S.C. 2379.

(1) To the extent necessary to make a determination of price reasonableness, the contracting officer shall require the offeror to submit prices paid for the same or similar commercial items

under comparable terms and conditions by both Government and commercial customers.

(2) If the contracting officer determines that the offeror cannot provide sufficient information described in paragraph (d)(1) of this section to determine the reasonableness of price, the contracting officer shall request the offeror to submit information on—

(i) Prices paid for the same or similar items under different terms and conditions;

(ii) Prices paid for similar levels of work or effort on related products or services;

(iii) Prices paid for alternative solutions or approaches; and

(iv) Other relevant information that can serve as the basis for a price reasonableness determination.

(3) If the contracting officer determines that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price, the contracting officer shall request the offeror to submit other relevant information, including uncertified cost data. However, no uncertified cost data may be required in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(4) An offeror shall not be required to submit information described in paragraph (d)(3) of this section with regard to a commercially available off-the-shelf item. An offeror may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraphs (d)(1) and (2) of this section is not sufficient to determine the reasonableness of price.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

14. Revise section 239.101 to read as follows:

239.101 Policy.

(1) A contracting officer may not enter into a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the contracting activity determines in writing that no commercial items are suitable to meet the agency's needs, as determined through the use of market research appropriate to the circumstances (see FAR 10.001(a)(3)) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

(2) See subpart 208.74 when acquiring commercial software or software maintenance.

(3) See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

PART 252—ACQUISITION OF INFORMATION TECHNOLOGY

15. Add section 252.215-7010 to read as follows:

252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

Basic. As prescribed in 215.408(6)(i) and (6)(i)(A), use the following provision:

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA—BASIC (JAN 2018)

(a) Definitions. As used in this provision—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Non-Government sales means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror on sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient non-Government sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

Uncertified cost data means the subset of "data other than certified cost or pricing data" (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data. (1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in paragraphs (b)(1)(i) and (ii) of this provision. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted and whether the price is fair and reasonable.

(i) Exception for prices set by law or regulation - Identification of the law or regulation establishing the prices offered. If the prices are controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar

items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract number and military department, defense agency, or other DoD component that rendered such determination, and if available, a Government point of contact;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) If the catalog pricing provided with this proposal is not consistent with all relevant sales data, a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments);

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit the DoD to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement or transaction, any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror shall prepare and submit certified cost or pricing data and supporting attachments in accordance with the instructions contained in Table 15-2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15-2 are incorporated as a mandatory format to be used in any resultant contract, unless the Contracting Officer and the Offeror agree to a different format and change this provision to use Alternate I.

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(d) Requirements for data other than certified cost or pricing data. (1) Data other than certified cost or pricing data submitted in accordance with this provision shall include the minimum information necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) Within 10 days of a written request from the Contracting Officer for additional information to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(4) Subcontract price evaluation. (i) Offerors shall obtain from subcontractors the minimum information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost data may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(e) Subcontracts. The Offeror shall insert the substance of this provision, including this paragraph (e), in subcontracts exceeding the simplified acquisition threshold defined in FAR part 2. The Offeror shall require prospective subcontractors to adhere to the requirements of—

(1) Paragraphs (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and

(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(End of provision)

Alternate I. As prescribed in 215.408(6)(i) and (6)(i)(B), use the following provision, which includes a different paragraph (c)(1).

REQUIREMENTS FOR CERTIFIED COST OR PRICING DATA AND DATA OTHER THAN CERTIFIED COST OR PRICING DATA—ALTERNATE I (JAN 2018)

(a) Definitions. As used in this provision—

Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

Non-Government sales means sales of the supplies or services to non-Governmental entities for purposes other than governmental purposes.

Relevant sales data means information provided by an offeror on sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets, or other adjustments).

Sufficient non-Government sales means relevant sales data that reflects market pricing and contains enough information to make adjustments covered by FAR 15.404-1(b)(2)(ii)(B).

Uncertified cost data means the subset of “data other than certified cost or pricing data” (see FAR 2.101) that relates to cost.

(b) Exceptions from certified cost or pricing data. (1) In lieu of submitting certified cost or pricing data, the Offeror may submit a written request for exception by submitting the information described in paragraphs (b)(1)(i) and (ii) of this provision. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted and whether the price is fair and reasonable.

(i) Exception for price set by law or regulation - Identification of the law or regulation establishing the price offered. If the price is controlled under law by periodic rulings, reviews, or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the contracting office.

(ii) Commercial item exception. For a commercial item exception, the Offeror shall submit, at a minimum, information that is adequate for evaluating the reasonableness of the price for this acquisition, including prices at which the same item or similar items have been sold in the commercial market. Such information shall include—

(A) For items previously determined to be commercial, the contract number and military department, defense agency, or other DoD component that rendered such determination, and if available, a Government point of contact;

(B) For items priced based on a catalog—

(1) A copy of or identification of the Offeror's current catalog showing the price for that item; and

(2) If the catalog pricing provided with this proposal is not consistent with all relevant sales data, a detailed description of differences or inconsistencies between or among the relevant sales data, the proposed price, and the catalog price (including any related discounts, refunds, rebates, offsets, or other adjustments);

(C) For items priced based on market pricing, a description of the nature of the commercial market, the methodology used to establish a market price, and all relevant sales data. The description shall be adequate to permit the DoD to verify the accuracy of the description;

(D) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item; or

(E) For items provided by nontraditional defense contractors, a statement that the entity is not currently performing and has not performed, for at least the 1-year period preceding the solicitation of sources by the DoD for the procurement or transaction, any contract or subcontract for the DoD that is subject to full coverage under the cost accounting

standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section.

(2) The Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and to determine the reasonableness of price.

(c) Requirements for certified cost or pricing data. If the Offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Offeror shall submit certified cost or pricing data and supporting attachments in the following format: [Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.408, Table 15-2, Note 2. The Contracting Officer shall insert the description at the time of issuing the solicitation or specify that the format regularly maintained by the offeror or prospective subcontractor in its business operations will be acceptable. The Contracting Officer may amend the description as the result of negotiations.]

(2) As soon as practicable after agreement on price, but before contract award (except for unpriced actions such as letter contracts), the Offeror shall submit a Certificate of Current Cost or Pricing Data, as prescribed by FAR 15.406-2.

(d) Requirements for data other than certified cost or pricing data. (1) Data other than certified cost or pricing data submitted in accordance with this provision shall include all data necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements in DFARS 215.402(a)(i) and 215.404-1(b).

(2) In cases in which uncertified cost data is required, the information shall be provided in the form in which it is regularly maintained by the Offeror or prospective subcontractor in its business operations.

(3) The Offeror shall provide information described as follows: [Insert description of the data and the format that are required, including access to records necessary to permit an adequate evaluation of the proposed price in accordance with FAR 15.403-3.]

(4) Within 10 days of a written request from the Contracting Officer for additional information to support proposal analysis, the Offeror shall provide either the requested information, or a written explanation for the inability to fully comply.

(5) Subcontract price evaluation. (i) Offerors shall obtain from subcontractors the information necessary to support a determination of price reasonableness, as described in FAR part 15 and DFARS part 215.

(ii) No cost information may be required from a prospective subcontractor in any case in which there are sufficient non-Government sales of the same item to establish reasonableness of price.

(iii) If the Offeror relies on relevant sales data for similar items to determine the price is reasonable, the Offeror shall obtain only that technical information necessary—

(A) To support the conclusion that items are technically similar; and

(B) To explain any technical differences that account for variances between the proposed prices and the sales data presented.

(e) Subcontracts. The Offeror shall insert the substance of this provision, including this paragraph (e), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2. The Offeror shall require prospective subcontractors to adhere to the requirements of—

(1) Paragraph (c) and (d) of this provision for subcontracts above the threshold for submission of certified cost or pricing data in FAR 15.403-4; and

(2) Paragraph (d) of this provision for subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(End of provision)

16. Add section 252.215-7011 to read as follows:

252.215-7011 Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor.

As prescribed in 215.408(6)(ii), use the following provision:

REQUIREMENTS FOR SUBMISSION OF PROPOSALS TO THE ADMINISTRATIVE CONTRACTING OFFICER AND CONTRACT AUDITOR (JAN 2018)

When the proposal is submitted, the Offeror shall also submit one copy each to—

- (a) The Administrative Contracting Officer; and
- (b) The Contract Auditor.

(End of provision)

17. Add section 252.215-7012 to read as follows:

252.215-7012 Requirements for Submission of Proposals via Electronic Media.

As prescribed in 215.408(6)(iii), use the following provision:

REQUIREMENTS FOR SUBMISSION OF PROPOSALS VIA ELECTRONIC MEDIA (JAN 2018)

The Offeror shall submit the cost portion of the proposal via the following electronic media: [Insert media format, e.g., electronic spreadsheet format, electronic mail, etc.]

(End of provision)

18. Add section 252.215-7013 to read as follows:

252.215-7013 Supplies and Services Provided by Nontraditional Defense Contractors.

As prescribed in 215.408(7), use the following provision:

SUPPLIES AND SERVICES PROVIDED BY NONTRADITIONAL DEFENSE CONTRACTORS
(JAN 2018)

Offerors are advised that in accordance with 10 U.S.C. 2380a, supplies and services provided by a nontraditional defense contractor, as defined in DFARS 212.001, may be treated as commercial items. The decision to apply commercial item procedures to the procurement of supplies and services from a nontraditional defense contractor does not require a commercial item determination and does not mean the supplies or services are commercial.

(End of provision)

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